# Petition

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NO._____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

KIM EDWARD MINIS,
*Petitioner*

v.

UNITED STATES OF AMERICA,
*Respondent*

**Petition for Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit**

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## QUESTIONS PRESENTED

WHETHER THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW IN REVIEWING A DISTRICT COURT'S DETERMINATION OF A CRIMINAL DEFENDANT'S MOTION TO SUPPRESS?

WHETHER THE COURT OF APPEALS' DECISION BASED UPON THE STANDARD REVIEW IT APPLIED (ARBITRARINESS OF THE MAGISTRATE'S DECISION) WAS SO DEVOID OF EVIDENTIARY SUPPORT AS TO RENDER THE COURT OF APPEALS' DECISION UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?

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OCTOBER TERM, 1982

KIM EDWARD MINIS,
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v.

UNITED STATES OF AMERICA,
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**Petition for Writ of Certiorari to**
**The United States Court of Appeals**
**For the Fifth Circuit**

*To The Honorable Supreme Court of the United States:*

## OPINION BELOW

The opinion of the Court of Appeals is reported at ____F.2d____, and is printed as Appendix "A" hereto.

## JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on January 20, 1982. This Petition for Certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall, issue but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the person or things to be seized.

United States Constitution, Fifth Amendment:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

## STATEMENT OF THE CASE

Petitioner, Kim Edward Minis, was charged in a two count indictment alleging that he possessed cocaine and marijuana with intent to distribute [21 U.S.C. § 841(a)(1)]. The charges originated from the execution of a federal search warrant on October 18, 1980, on a six-acre rural residence under the custody of Petitioner. The District Court granted Petitioner's Motion to Suppress on the grounds that the affidavit in support of the search warrant failed to establish probable cause, but the Court of Appeals made an independent review of the sufficiency of the affidavit and thereafter vacated the District Court's judgment and remanded the case.

On October 18, 1980, U.S. Customs Service Special Agent Kenneth Brumfield obtained a search warrant from the U.S. Magistrate in Austin, Texas, for a six-acre rural residence known as the Crooked Oak Ranches at 14808 Hamilton Pool Road, owned by William J. Everett. The

affidavit in support of the search warrant alleged that William Everett and one Travis Ashbrook were part of an international drug smuggling conspiracy. The information was obtained primarily by the use of a court-ordered wiretap from the Eastern District of California, the legality of which is presently before the Court of Appeals for the Ninth Circuit.

On July 20, 1980, a telephone conversation between William Everett (from a telephone at a location different from the Hamilton Pool Road address, i.e., his Austin, Texas apartment) and another party was intercepted. Everett stated that he had "got the house along pretty good" and was growing "a whole bunch of A's" which were eighteen (18″) inches high.

Surveillance by the U.S. Customs Service established that Ashbrook left California on October 11, 1980, some two months and twenty days after the aforementioned conversation, and arrived in Austin, Texas, on October 13, 1980, where he met with Everett at his apartment. On that same evening, Ashbrook and Everett were observed leaving the apartment with Ashbrook carrying a tan leather case. They travelled to the Hamilton Pool Road location, which was the later target of the search warrant complained of, remained approximately two hours and then returned to the apartment in Austin, Texas. The tan leather case was not observed upon their return. On October 14 and 15, 1980, Ashbrook and Everett were again followed to the Hamilton Pool Road location where they remained approximately four hours each day. A final trip to the Hamilton Pool Road location was made on October 16, 1980, by Everett who remained a short while and then returned to Austin, Texas. Later

on October 16, 1980, Ashbrook and Everett departed Austin and travelled to the Houston Intercontinental Airport where a federal search warrant was executed on Everett and Ashbrook and One Hundred Seventy Thousand Dollars ($170,000.00) in U.S. Currency was seized.

Thereafter, based upon an affidavit containing the above information as its principal supporting facts, the search warrant which led to the arrest of Petitioner, Kim Edward Minis, was issued.

## REASONS FOR GRANTING THE WRIT

### I. THE OPINION OF THE FIFTH CIRCUIT IS IN IRRECONCILABLE CONFLICT WITH UNITED STATES V. MENDENHALL, 100 S.Ct. 1870 (1980).

The question of the proper standard of review to be applied by a Court of Appeals in reviewing a District Court's determination of the sufficiency of the evidence presented to a magistrate in support of a search warrant is a frequently recurring problem of great importance.

The Court has held that where a District Court's finding was sustained by the record, a Court of Appeals would be in error to substitute its view of the evidence for that finding. *U.S. v. Mendenhall,* 100 S.Ct. at 1879 (1980). The Court's decision requires a Court of Appeals not to set aside a finding of a District Court unless it is "clearly erroneous".

In this case in its review of a District Court's determination of a criminal defendant's Motion to Suppress the Fifth Circuit has departed from the "clearly erroneous" standard of review to substitute an independent review

of the sufficiency of the affidavit which allegedly provided probable cause for the search warrant. The Court should clarify its holding in *U.S. v. Mendenhall.*

## II. THE FIFTH CIRCUIT IS IN CONFUSION AS TO WHAT STANDARD OF REVIEW IT SHOULD APPLY WHEN REVIEWING A DISTRICT COURT'S DETERMINATION OF A CRIMINAL DEFENDANT'S MOTION TO SUPPRESS.

The Fifth Circuit has expressed its uncertainty as to what standard of review it should apply in reviewing a District Court's determination of the question of voluntariness.

> "We note that this Court and the Supreme Court have muddied the waters with regard to the proper standard of review. See, *Jurek v. Estelle,* 623 F.2d 929, 956-63 (5th Cir. 1980) (en banc). In *Mendenhall* the Supreme Court vaguely indicates that clearly erroneous is the correct standard. ____U.S. at ____, 100 S.Ct. at 1879.
>
> *U.S. v. Pulvano,* 629 F.2d 1151, at 1156, note 7 (5th Cir. 1980).

The Fifth Circuit has historically applied the "clearly erroneous" standard of review to a District Court's determination with regard to a criminal defendant's Motion to Suppress. *U.S. v. Montos,* 421 F.2d 215, at 219, note 1 (5th Cir. 1970); *U.S. v. Gunn,* 428 F.2d 1057, at 1060 (5th Cir. 1970). The Fifth Circuit's confusion on this issue extends into its opinion in Petitioner Minis' case. The Fifth Circuit began its review in this case as an "independent review of the sufficiency of the affidavit" (Opinion below, at p. 687) and ended by deciding that

it could not say "that the Magistrate . . . . erred in his conclusion that a person of reasonable caution would believe that the articles were located at the place proposed to be searched." (Opinion below, p. 689).

The Court should provide guidance to the Fifth Circuit to resolve the intracircuit conflicts and the confusion expressed by the Fifth Circuit by clarifying its decision in *U.S. v. Mendenhall.*

## III. THE QUESTION OF THE STANDARD OF REVIEW TO BE APPLIED BY A COURT OF APPEALS IN REVIEWING THE DETERMINATION OF A DISTRICT COURT OF A CRIMINAL DEFENDANT'S MOTION TO SUPPRESS IS AN IMPORTANT, FREQUENTLY RECURRING ISSUE.

Motions to Suppress are commonly filed in thousands of criminal cases heard in the District Courts nationwide. Though the specific constitutional issues involved in Motions to Suppress vary from case to case, and though several of the issues have been considered by the Court, it is clear that a uniformity is desirable in dealing with the numerous reviews of decisions rendered by District Courts in Motions to Suppress which concern factual determinations by the District Courts.

Thousands of criminal defendants are affected by the issue involved here. A decision clarifying the standard of review to be applied to Motions to Suppress would not only guide Courts of Appeal in their review, but also give the potential appellants a predictable factor to be considered in making the threshold decision of whether or not to appeal.

## IV. THE OPINION OF THE FIFTH CIRCUIT IS SO DEVOID OF ANY BASIS IN THE EVIDENCE AS TO RENDER IT UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The District Court, after an evidentiary hearing, correctly found that there was no evidence that the articles sought in the search warrant would be found at the place to be searched.

Applying the standard of review used by the Fifth Circuit (an independent review of the sufficiency of the affidavit which allegedly provided probable cause for the search warrant) to the facts of this case would not supply sufficient probable cause for the issuance of a search warrant. *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1965); *Spinelli v. U.S.,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *U.S. v. Ventresca,* 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); *Rugendorf v. U.S.,* 376 U.S. 528, 84 S.Ct. 725, 14 L.Ed. 2d 887 (1964); *Giordenella v. U.S.,* 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958); *James v. U.S.,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); *Go-bart v. U.S.,* 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 544 (1931); *Stanford v. Texas,* 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *Scott v. U.S.,* 436 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967); *Sgro v. U.S.,* 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932); *Grau v. U.S.,* 287 U.S. 124, 53 S.Ct. 38, 77 L.Ed. 212 (1932); *Byars v. U.S.,* 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1926). The Court should grant certiorari to decide whether the Court of Appeals in applying the standard of review which it applied in this case violated the pro-

visions of the due process clause of the Fifth Amendment to the United States Constitution and the provisions of the Fourth Amendment to the United States Constitution in its determination of the existence of probable cause.

## CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to the United States Attorney for the Western District of Texas and the Solicitor General, Washington, D.C., on this the _____ day of March, 1982.

STEVEN BERCU

# Appendix

# APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,

v.

Kim Edward MINIS,
Defendant-Appellee.

No. 81-1116

Summary Calendar.

UNITED STATES COURT OF APPEALS
Fifth Circuit.

Jan. 20, 1982.

The United States District Court for the Western District of Texas, William S. Sessions, Chief Judge, granted defendant's motion to suppress evidence seized in search, and United States appealed. The Court of Appeals, Randall, Circuit Judge, held that facts and circumstances described in affidavit were sufficient to establish probable cause to search premises.

Vacated and remanded.

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Appeal from the United States District Court for the Western District of Texas.

Before CLARK, Chief Judge, RANDALL and WILLIAMS, Circuit Judges.

RANDALL, Circuit Judge:

In a search of a six acre rural residence under the custody of defendant-appellant Kim Edward Minis, federal agents discovered multi-pound quantities of marijuana being processed by Minis, approximately three and one-half ounces of cocaine in a safe in the kitchen, and two fields of growing marijuana. Minis was charged in a two-count indictment with possession with intent to distribute cocaine and marijuana in violation of 21 U.S.C. § 841(a)(1). The district court, however, granted Minis' motion to suppress the evidence seized in the search on the grounds that the affidavit in support of the search warrant pursuant to which the search was conducted failed to establish the necessary probable cause. The government appeals, arguing: (1) that the district court erred in overruling the magistrate's determination that probable cause existed; and (2) that assuming probable cause did not exist for the issuance of the search warrant, the good-faith exception to the exclusionary rule should have been applied. We conclude that the affidavit supporting the search warrant did establish the necessary probable cause, and we therefore VACATE the district court order granting Minis' motion to suppress and REMAND for consideration of Minis' arguments not resolved in the original proceeding.

*I. Statement of Facts.*

On October 18, 1980, a search warrant was issued for the search of the six acres of property, "including the personal residence located therein and all outbuildings," located at 14808 Hamilton Pool Road, Bee Cave, Texas

and identified as the Crooked Oak Ranches.[1] On executing the search warrant, agents discovered Minis processing "multi-pound" quantities of marijuana in the living room of the one-bedroom residence located on the property.[2] They also discovered approximately three and one-half ounces of cocaine in a combination safe in the kitchen of the searched residence and two cultivated fields of marijuana approximately 100 to 150 yards from the residence.

The warrant pursuant to which the search took place was issued on the basis of the affidavit of United States Customs Service Special Agent Kenneth Brumfield. The affidavit set out the personal observations of Brumfield and other agents which allegedly gave them probable cause to believe that William Everett, under their surveillance as part of an investigation of a supposed international drug smuggling conspiracy, was "cultivating marijuana at the location of 14808 Hamilton Pool Road Bee Caves, Texas, is distributing controlled substances, and secreting the profits derived therefrom in foreign corporations in the Cayman Islands, British West Indies." The warrant therefore authorized the search of the six acres of property, which the affidavit indicated was owned by Everett, located at 14808 Hamilton Pool Road and identified as the Crooked Oak Ranches, including the personal residence located therein and all outbuildings, for controlled substances, currency derived from the sale of such controlled substances and books, ledgers, correspondence and records relating to narcotics transactions

1. The affidavit in support of the search warrant also contained a legal description of the property to be searched.

2. In addition to that building, there was also a newly built 3-bedroom house on the property.

and the laundering of currency through foreign corporations.

The affidavit first set out a series of intercepted telephone communications to and from telephone numbers in California, the interception of which was allegedly authorized by a court order from the district court for the Eastern District of California on June 7, 1980. The interception order was allegedly based on information that a group known as the Brotherhood of Eternal Love was going to smuggle approximately 8,000 kilos of hashish into the United States. The first three conversations summarized in the affidavit[3] took place in September

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3. The summaries were as follows:

I.—Sept. 11, 1980: Travis G. Ashbrook called Mario Pirri in Italy. (A partner in his narcotic smuggling activities.) A synopis of that telephone conversation is as follows:

PIRRI told ASHBROOK he needed to get in touch with OLIVIT because they needed to make some major decisions about the work being done by GASBARI. PIRRI said he thought it best to talk to OLIVIT because ASHBROOK was not "in tune" with the boat. ASHBROOK agreed saying that he had never seen the boat. PIRRI then told ASHBROOK he (PIRRI) was going to meet their "friend" in Paris on Monday, September 15, 1980, and that he would call ASHBROOK back and let him know the outcome. ASHBROOK told PIRRI to say hello to "ABDUL." PIRRI told ASHBROOK they needed about $65,000 to complete the boat. ASHBROOK said he was going down to "that place" at the end of September and would take 2 for AMHAZ and would send $75,000 to GASBARI for the boat. PIRRI told ASHBROOK the money would have to go through the "company."

II.—Sept. 13, 1980: Travis Ashbrook in a conversation with George O'[illegible]'t (Ashbrook's step-brother and partner in narcotics smuggling activities). A synopsis of that conversation is as follows:

ASHBROOK and OLIVIT discussed the boat and PIRRI's need to talk to OLIVIT. ASHBROOK told OLIVIT that he (ASHBROOK) was going down "south" in two weeks (end of September 1980) and take a "couple" for their friend as well as $75,000 for the boat. ASHBROOK said he had to send it through the "company." OLIVIT suggested ASHBROOK take "BILL." ASHBROOK agreed because "BILL'S" name was on the deal and that ASHBROOK

1980 and indicated that Travis G. Ashbrook and a person referred to as "Bill," would be taking a trip "out of the United States with a large amount of United States currency well in excess of the $5,000 required to be reported by 31 U.S.C. 1101."[4] Ashbrook is described in the affidavit as prominent in the Brotherhood of Love, as documented in United States Customs files since 1969, and as having been arrested and convicted of smuggling hashish into the United States in 1969 by a federal court in

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didn't want to show himself; he would let BILL make the transaction. ASHBROOK said that PIRRI was going to talk to their friend and get everything worked out. ASHBROOK said that PIRRI had agreed to pay for their losses out of his own pocket. ASHBROOK and OLIVIT then talked about a crew for a boat.

III.—Sept. 24, 1980: Travis G. Ashbrook in a conversation with Mario Pirri in Italy. A synopsis of that telephone conversation is as follows:

PIRRI told ASHBROOK that he had seen the friend and that everything was fine. PIRRI said the shipment was "packed and waiting" for them whenever they wanted to pick it up. PIRRI said the "friend" was lowering the price to compensate ASHBROOK for the loss suffered before. PIRRI said that the total payment to the "friend" for the next was to be 5 million but they had to have $400,000 out front. PIRRI said he had already paid the friend $200,000 as part of the $400,000 up front. ASHBROOK said he was going to send the other $200,000 plus $75,000 for the boat in two or three weeks.

4. 31 U.S.C. § 1101 provides:

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments—

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

California. Brumfield believed that the money to be taken out of the United States was to be a down payment for the aforementioned narcotics transaction and for repairs to the vessel which was to be used to smuggle the narcotics into the United States. The fourth conversation allegedly took place on July 20, 1980 between William Everett (believed to be the person referred to as "Bill"), on a telephone located at 2611 Bee Cave Road #102, Austin, Texas, and Patrick Brignole, allegedly a partner of Ashbrook. The synopsis of this conversation was as follows:

> "Bill advised that he had 'got the house, along pretty good and everything,' and that his garden and plants were starting to come along really good, though the heat wasn't helping the situation. Bill Everett and Pat Brignole discuss the cultivation process and Everett states that he 'did a whole bunch of A's.' (Note—"A's" are known to me to be the African variety of marihuana plants.)"

An excerpt of the conversation was attached to and incorporated in the affidavit.

In addition to the intercepted conversations, the affidavit set out certain activities of Ashbrook and Everett during the week preceeding the search of the Hamilton Pool Road property disclosed by continuing surveillance by United States Customs special agents. The surveillance revealed that on October 11, 1980 Ashbrook left his residence in Lone Pine, California and travelled to Austin. He arrived in Austin on October 13, 1980 where he met with Everett. On October 13, 1980, at 8:00 a. m., Ashbrook and Everett departed 2611 Bee Cave Road, Apartment 102, Austin, Texas and drove to the property lo-

cated at 14808 Hamilton Pool Road, Bee Cave, Texas.[5] The affidavit indicates that when they left the Bee Cave Road apartment, Ashbrook placed a tan leather case in the truck, but that when they returned to the Bee Cave Road apartment, approximately two hours later, no tan leather case was removed by them. Later that day, they were observed going to an Austin travel agency where they purchased two round-trip tickets from Houston, Texas to Grand Cayman Island, British West Indies, to depart on October 16, 1980 on Cayman Airways and to return on October 18, 1980.[6] Ashbrook and Everett were again observed going to the Hamilton Pool Road property on October 14 and 15, 1980 for about four hours each day. On the morning of October 16, 1980, Everett was again observed going to the Hamilton Pool Road property for about one hour.

Finally, the affidavit discloses that later on the morning of October 16, 1980, Ashbrook and Everett were observed departing the Bee Cave Road apartment from which they travelled to Houston, Texas and then to Houston Intercontinental Airport. They were observed checking in at the Cayman Airways ticket counter for Flight 63 to the Cayman Islands. When Ashbrook and Everett failed to fill out United States Customs currency reporting forms before taking their seats on the plane, agents executed a federal

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5. The affidavit also states that Ashbrook possessed a Texas driver's license in the name of Michael Webber at the Bee Cave Road address. Also noted in the affidavit was that investigation disclosed that no house existed at the Hamilton Pool Road site in February 1980 and that there was at the time of the affidavit a new house at that location.

6. The travel agent stated in an interview that the tickets were purchased with $612.00 cash and were issued in the names of W. Everett and M. Webber.

search warrant on their checked luggage and their persons. In the luggage, the agents found, among other things, $170,000 in United States currency and letters, documents and correpondence indicating an interest in a foreign corporation in the Cayman Islands, British West Indies.

*II. The District Court Finding of No Probable Cause.*

A preliminary hearing was held, on October 31, 1980, at which the United States Magistrate found probable cause for the search of the Hamilton Pool Road property. On January 7, 1981, a hearing was held on Minis' motion to suppress the evidence seized in this search, however, and on January 14, 1981, the district court ordered that all evidence seized in the search be suppressed in the trial of Minis.[7] The district court held that the information contained in the affidavit did not satisfy the test of probable cause and that, because the affidavit failed to establish probable cause to believe either that marijuana was being grown on the premises or that records of narcotics and foreign currency laundering transactions were present on the premises, the search warrant and subsequent search conducted pursuant to the warrant were invalid.[8]

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7. The district court held that Minis had standing to assert the Fourth Amendment violation, having a legitimate expectation of privacy in the premises searched, because he was the caretaker of the entire premises. Although the government moved for reconsideration of the "standing" decision, which motion was denied, they do not raise the "standing" issue on appeal, and we therefore do not consider it here.

8. In his motion to suppress, Minis argued, in addition to his argument that the affidavit failed to establish the probable cause constitutionally required for the issuance of a valid search warrant, that the warrant authorized a general search also prohibited by the Fourth Amendment, that the evidence was derived from intercepted communications without timely receiving a required court order under 18 U.S.C. 2517(5) and that the search of a 1980 Ford pickup was

[1, 2] Because the decision of the district court was a determination only of the narrow question whether the information contained in the affidavit satisfied the test of probable cause, it is a ruling of law based strictly on written evidence, and our review is therefore not limited to the "clearly erroneous" standard. *See, e.g., United States v. Pulvano,* 629 F.2d 1151, 1156 (5th Cir. 1980). We instead make an independent review of the sufficiency of the affidavit. *Id.* at 1156-57 n.7. In doing so, though, we are mindful of the oft-cited opinion of this court in *Bastida v. Henderson,* 487 F.2d 860, 863 (5th Cir. 1973):

> In issuing a search warrant the magistrate must exercise his own judgment as to whether the facts alleged in the affidavit constitute probable cause for issuance of the warrant, he must act on the entire picture disclosed to him, he is entitled to use his common sense, and the courts have gone so far as to say that when this is done *his determination is conclusive in the absence of arbitrariness.*

(Emphasis added.) *Accord, United States v. Allen,* 588 F.2d 1100, 1105-06 (5th Cir. 1979), *cert. denied sub nom., Perkins v. United States,* 441 U.S. 965, 99 S.Ct. 2415, 60 L.Ed.2d 1071 (1979), and cases cited therein. Put another way, we have said: "It is axiomatic that an affidavit for search warrant is to be interpreted in a common sense and realistic manner, and the magistrate's finding of probable cause should be sustained in doubtful or marginal cases." *United States v. Maestas,* 546 F.2d 1177, 1180 (5th Cir. 1977), *citing United States v. Ventresca,* 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684

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not authorized by the warrant and was not based on a combination of probable cause and exigent circumstances. The district court, however, decided only the probable cause issue.

(1965). We are also mindful that "probable cause is the sum total of layers of information and the synthesis of what police have heard, what they know, and what they observed as trained officers. We weigh not individual layers but the 'laminated' total." *United States v. Edwards,* 577 F.2d 883, 895 (5th Cir.) (en banc), *cert. denied,* 439 U.S. 968, 99 S.Ct. 458, 58 L.Ed.2d 427 (1978), *quoting Smith v. United States,* 358 F.2d 833, 837 (D.C. Cir. 1966), *cert. denied,* 386 U.S. 1008, 87 S.Ct. 1350, 18 L.Ed.2d 448 (1967). *Accord, United States v. Weinrich,* 586 F.2d 481, 490 (5th Cir. 1978), *cert. denied,* 441 U.S. 927, 99 S.Ct. 2041, 60 L.Ed.2d 402 and *cert. denied sub nom., Blair v. U.S.,* 440 U.S. 982, 99 S.Ct. 1792, 60 L.Ed.2d 243 (1979).

> "Probable cause" means something more than "mere suspicion," *Brinegar v. United States,* 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949). Probable cause requires the existence of facts " 'sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed" and the person to be arrested [or searched] committed it. *Id.*
>
> A bright line cannot always be drawn between "mere suspicion" and probable cause.

*United States v. Gordon,* 580 F.2d 827, 832 (5th Cir. 1978), *cert. denied,* 439 U.S. 1051, 99 S.Ct. 731, 58 L.Ed.2d 711 (1979), and *cert. denied sub nom., Garcia v. U.S.,* 439 U.S. 1079, 99 S.Ct. 860, 59 L.Ed.2d 49 (1978). *Accord, United States v. Rasor,* 599 F.2d 1330, 1332 (5th Cir. 1979). Minis argues that there is no evidence establishing that the articles sought would be found at the place sought to be searched. It is not necessary,

however, that the articles sought actually have been seen at the place to be searched. In *United States v. Maestas*, 546 F.2d 1177, 1180 (5th Cir. 1977), we stated the test as follows:

> The affidavit need not contain information providing certainty that the objects sought will be found as a result of the search. It is only necessary that "the facts and circumstances described in the affidavit would warrant a man of reasonable caution to believe that the articles sought were located" at the place where it was proposed to search.

(*quoting United States v. Rahn*, 511 F.2d 290, 293 (10th Cir.), *cert. denied*, 423 U.S. 825, 96 S.Ct. 41, 46 L.Ed. 2d 42 (1975)). Reaffirming that test in *United States v. Scott*, 555 F.2d 522, 527 (5th Cir.), *cert. denied sub nom., Ogletree v. United States*, 434 U.S. 985, 98 S.Ct. 610, 54 L.Ed.2d 478 (1977), we observed that "this court and others, albeit without discussion, have upheld searches, although the nexus between the items to be seized and the place to be searched rested not on direct observation but on the normal inferences as to where the articles sought would be located." *See also United States v. Allen*, 588 F.2d 110 (5th Cir.), *cert. denied sub nom., Perkins v. United States*, 441 U.S. 965, 99 S.Ct. 2415, 60 L.Ed.2d 1071 (1979); *Bastida v. Henderson*, 487 F.2d 860 (5th Cir. 1973); *Castle v. United States*, 287 F.2d 657 (5th Cir.), *vacated for resentencing*, 368 U.S. 13, 82 S.Ct. 123, 7 L.Ed.2d 75 (1961). *Compare United States v. Green*, 634 F.2d 222 (5th Cir. 1981); *United States v. Rasor*, 599 F.2d 1330 (5th Cir. 1979).

[3] As noted above, "[a] bright line cannot always be drawn between 'mere suspicion' and probable cause."

*Gordon, supra,* 580 F.2d at 832. Nevertheless, we believe that " 'the facts and circumstances described in the affidavit would warrant a man of reasonable caution to believe that the articles sought were located at the place where it was proposed to search.' " *Maestas, supra,* at 1180. In the intercepted July 20, 1980 telephone conversation, according to the affidavit, the person identified as Everett spoke of his garden, the size of the plants, and about a process of "topping." He also said that he "did a whole bunch of A's" and that they were the ones that "are along the farthest" and which he "got . . . in first." It was reasonable to infer from this conversation, and the affiant's knowledge of "A's" being a slang term for the African variety of marijuana plants, that Everett was cultivating marijuana. When physical surveillance then revealed Everett going from his apartment to a large rural residence, owned by him, for a couple of hours each day, there was probable cause to believe that Everett was growing the marijuana at this location. This property was a "logical" place to find the garden of illicit plants which would grow, according to the conversation, to be five to six feet high and as big around as a man's chest. *Cf. Allen, supra,* at 1106 (search of apartment for gambling paraphernalia); *Scott, supra,* at 527-28 (search of residence for gambling paraphernalia); *Maestas, supra,* at 1180 (search of defendant's apartment for counterfeiting paraphernalia); *Bastida, supra,* at 863 (search of premises where defendants lived for pistols allegedly used in armed robbery). The fact that Everett and Ashbrook travelled to the rural property several days in a row before leaving for the Houston airport where they were arrested also gave probable cause to believe that evidence relating to their narcotics operation would be found at the rural

property. Although an individual piece of information, like the placing of the tan leather case in the truck upon leaving for the property, and not removing it upon returning from the property may have been innocent enough in itself, it is an additional layer in the "laminated total" which we weigh to determine probable cause. *See United States v. Weinrich,* 586 F.2d 481, 490 (5th Cir. 1978), *cert. denied,* 441 U.S. 927, 99 S.Ct. 2041, 60 L.Ed.2d 402 and *cert. denied sub nom., Blair v. United States,* 440 U.S. 982, 99 S.Ct. 1792, 60 L.Ed.2d 243. Looking at all of the facts and circumstances set out in the affidavit, we cannot say that the magistrate, whose determination, based on the entire picture presented to him and his common sense, is conclusive in the absence of arbitrariness, erred in his conclusion that a person of reasonable caution would believe that the articles sought were located at the place proposed to be searched.

[4] Minis argues that the information derived from the July 20, 1980 conversation allegedly referring to a growing crop of marijuana was so stale that it cannot be considered in determining whether the affidavit established probable cause to justify the issuance of the warrant (the warrant not having been issued until October 18, 1980). "It is a fundamental principle of search and seizure law that the information given to the magistrate in the application for a search warrant must be timely. Probable cause must be found to exist at the time the warrant issues." *United States v. Hyde,* 574 F.2d 856, 864 (5th Cir. 1978). *See Sgro v. United States,* 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932). Again, *Bastida v. Henderson,* 487 F.2d 860, 864 (5th Cir. 1973), provides the basic rule:

> In general, the basic criterion as to the duration of probable cause is the inherent nature of the crime. The Circuits hold that where an affidavit recites a mere isolated violation then it is not unreasonable to believe that probable cause quickly dwindles with the passage of time. On the other hand, if an affidavit recites activity indicating protracted or continuous conduct, time is of less significance. . . .

(Citations omitted.) "[S]taleness is an issue which must be decided on the peculiar facts of each case, and . . . a mechanical count of days is of little assistance in this determination." *Hyde, supra,* at 865. *Accord, United States v. Weinrich,* 586 F.2d 481, 491 (5th Cir. 1978), *cert. denied,* 441 U.S. 927, 99 S.Ct. 2041, 60 L.Ed.2d 402, and *cert. denied sub nom., Blair v. United States,* 440 U.S. 982, 99 S.Ct. 1792, 60 L.Ed.2d 243 (1979). The telephone conversation clearly indicates that the growing of the marijuana was a continuing process. Everett spoke of plants 18″ high which would grow to be five to six feet high. In addition, he spoke of growing the plants the previous year, comparing that year's crop to this year's. The nature of the activity, then, was clearly such that the July conversation combined with the observed October activities could establish probable cause to believe that marijuana was being grown at the searched location at the time the magistrate authorized the search.

### *III. The Good Faith Exception to the Exclusionary Rule?*

The government cites our alternative opinion in *United States v. Williams,* 622 F.2d 830, 840 (5th Cir. 1980) (en banc), in support of an argument that because the agent had a good faith and reasonable belief in the exist-

ence of probable cause and properly presented the facts to the magistrate the evidence should not be suppressed under the exclusionary rule. We do not address that argument here for two reasons: (1) our decision above that the evidence was not properly suppressed eliminates the need to make that determination; and (2) the government did not raise the argument before the district court in the suppression hearing, *see, e.g., Hudspeth v. United States,* 519 F.2d 1055, 1056 (5th Cir. 1975).

*IV. Conclusion.*

Our decision here is limited to a determination that the facts and circumstances described in the affidavit were sufficient to establish probable cause. Because the district court did not address Minis' other arguments as to the validity of the warrant, we must remand the case for further proceedings relating to Minis' motion to suppress not inconsistent with this decision.

VACATED and REMANDED.

# Opposition

Supreme Court, U.S.
FILED
MAR 31 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1737

# In the Supreme Court of the United States

OCTOBER TERM, 1981

KIM EDWARD MINIS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner contends that the court of appeals erred in reversing an order suppressing evidence obtained under a search warrant.

Petitioner was charged in a two-count indictment returned in the United States District Court for the Western District of Texas with possession of cocaine and marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Executing a search warrant, federal agents seized three and one-half ounces of cocaine from a residence that the court of appeals observed was in petitioner's (Pet. App. A-2) "custody" and several pounds of marijuana from the residence and two nearby fields. On petitioner's motion, the district court suppressed the evidence on the ground that the affidavit filed in support of the warrant failed to establish probable cause. Concluding that the affidavit was sufficient, the court of appeals reversed; the court remanded

the case for further proceedings on petitioner's motion to suppress (*id.* at A-1 to A-15).

Petitioner contends (Pet. 4-8) that the court of appeals did not apply the appropriate standard of review and that, in any event, the affidavit was insufficient to establish probable cause for the issuance of the warrant. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had determined that the affidavit was sufficient to establish probable cause. Petitioner is free to raise other arguments challenging the validity of the warrant. Moreover, if petitioner is acquitted following a trial on the merits, his claims will be moot. If, on the other hand, petitioner is convicted, he will then be able to present his present contention to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time. *E.g., Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A.R.R.*, 389 U.S. 327 (1967); see generally *American Construction Co.* v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384-388 (1893).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

MARCH 1982

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[1]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

DOJ-1982-03